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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

A. DOE, E. DOE, K. DOE, M. DOE, S. DOE, and Y. DOE,

Plaintiffs,

v.

KURT LUDWIGSEN, in his individual capacity, KIRSTEN LAMBERTSON, in her individual capacity, MICHAEL G. SCALES, individually and as President of Nyack College, DAVID C. JENNINGS, individually and as Executive Vice President of Nyack College, KEITH DAVIE, individually and as Athletic Director for Nyack College, AMANDA AIKENS, individually and as Assistant Athletic Director forNyack College, TAYLOR BROWN, individually and as Assistant Softball Coach for Nyack College, KAREN DAVIE, individually and as Director ofHuman Resources and Title IX Coordinator for Nyack College, NYACK COLLEGE, and DOES 1-10,

Defendants.

Case No.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL SUBPOENA COMPLIANCE

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL SUBPOENA COMPLIANCE

Pursuant to Fed.R.Civ.P. 45, Plaintiffs hereby move this court to compel subpoena compliance by Brittany Sturtevant.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The facts and procedural history relevant to the instant motion are fully set forth in the Declaration of Todd J. Krouner, Esq., dated March 20, 2018 ("Krouner Decl."), submitted herewith and attached hereto as Exhibit "1".

First, Plaintiffs' Motion to Compel a non-party to this action, Brittany Sturtevant, a.k.a. Allie Haze ("Ms. Sturtevant"), should be granted because the subpoena *ad testificandum* and *duces tecum* issued on or about October 26, 2017 (the "Subpoena"), addressed to Ms. Sturtevant, was properly severed on Ms. Sturtevant, and because the Subpoena seeks the testimony and documents that are within the scope of discovery. Second, this Court is the proper venue for enforcing the Subpoena against a non-party.

ARGUMENT

I. THE COURT SHOULD COMPEL MS. STURTEVANT TO COMPLY WITH THE SUBPOENA

Rule 45 of the Federal Rules of Civil Procedure ("Rule 45") authorizes federal courts to issue subpoenas to non-parties to "compel testimony or the production of documentary evidence in an ongoing case." Estate of Ungar v. Palestinian Auth., 396 F. Supp. 2d 376, 379 (S.D.N.Y. 2005). See also Salem Vegas, L.P. v. Guanci, 2013 WL 5493126, at *1 (D. Nev. Sep. 30, 2013) (acknowledging that Rule 45 authorizes federal courts to issue subpoenas against non-parties). Subpoenas issued pursuant to this rule allow a party to "obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." Koch v. Greenberg, 2009 WL 2143634, at *2 (S.D.N.Y. July 14, 2009) (citing Fed. R. Civ. P. 26(b)(1)); Painters Joint Comm. v. Employee Painters Trust Health & Welfare Fund, 2011 WL 4573349, at *5 (D. Nev. Sep. 29,

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2011) ("It is well established that the scope of discovery under a subpoena issued pursuant to Rule 45 is the same as the scope of discovery allowed under Rule 26(b)(1).").

Under Rule 45(a)(2), "[a] subpoena must issue from the court where the action is pending." Fed.R.Civ.P. 45(a)(2). The subpoena may specify a "[p]lace of [c]ompliance" that is "within 100 miles of where the person resides, is employed, or regularly transacts business in person." Fed.R.Civ.P. 45(c)(1)(a). Rule 45(d)(2)(B)(i) allows the serving party "[a]t any time, on notice to the commanded person" to "move the court for the district where compliance is required for an order compelling production or inspection."

Here, the motion to compel should be granted because the Subpoena was properly served on Ms. Sturtevant and seeks testimony and documents on topics within the scope of discovery. Additionally, Ms. Sturtevant should be compelled to produce subpoenaed documents two weeks prior to her deposition.

A. The Subpoena Was Properly Served And Is Valid.

In accordance with Rule 45(a), the Subpoena was issued from the United States District Court for the Southern District of New York, where this action is pending. (Krouner Decl. ¶ 5, Exhibit A.) The Subpoena satisfies the form and content requirements of Rule 45(a). On or about November 7, 2017, the Subpoena was properly served on Ms. Sturtevant in Las Vegas, Nevada. (See, Krouner Aff. ¶ 5, Exhibit B); Fed.R.Civ.P 45(b)(2); see also Probulk Carriers Limited v. Marvel, 180 F.Supp.3d 290, 292 (S.D.N.Y. 2016) (under Rule 45(b)(2), "[a] subpoena may be served at any place within the United States"); NML Capital Ltd. v. Republic of Argentina, 2014 WL 3898021, at *9 (D. Nev. August 11, 2014) ("A subpoena 'may be served at any place within the United States.'").

Ms. Sturtevant acknowledged receipt of the Subpoena on or about December 5, 2017, when Ms. Sturtevant called the Law Office of Todd J. Krouner, P.C. (Krouner Decl., ¶ 6.) The Subpoena requires Ms. Sturtevant's compliance at the Reisman Sorokac law office, located at 8965 South Eastern Avenue, Suite 382, Las Vegas, Nevada 89123, which is within 100 miles of where Mr. Sturtevant resides. See Fed. R. Civ. P. 45(c).

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Plaintiffs' made numerous attempts to reach out to Ms. Sturtevant to schedule the deposition on the dates convenient for Ms. Sturtevant. (See Krouner Decl., ¶ 6-10.) To date, Ms. Sturtevant has not replied. Id. ¶ 11.

The Subpoena was properly served and is valid. Ms. Sturtevant ignored Plaintiffs' request to arrange the deposition. Consequently, the Court should compel Ms. Sturtevant to comply with it.

B. The Subpoena Seeks Deposition Topics Within The Permissible Scope Of Discovery

Rule 26(b) provides that a party may obtain discovery regarding "any non-privileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b). Rule 26(b) "governs the scope of discovery from parties and non-parties alike." Crosby v. City of New York, 269 F.R.D. 267, 282 (S.D.N.Y. 2010); see also Painters Joint Comm., 2011 WL 4573349, at *5 ("It is well established that the scope of discovery under a subpoena issued pursuant to Rule 45 is the same as the scope of discovery allowed under Rule 26(b)(1)."); Night Hawk Ltd. v. Briarpatch Ltd., LP, 2003 WL 23018833, at *8 (S.D.N.Y. Dec. 23, 2003) (same); Salvatorie Studios Int'l v. Mako's Inc., 2001 WL 913945, at *1 (S.D.N.Y. Aug. 14, 2001) (same).

One of the allegations in this case is that defendant Kurt Ludwigsen brought a porn star, known as Allie Haze, to meet with plaintiffs on Nyack College's campus. He later had at least two plaintiffs meet with Ms. Sturtevant, in his office, after a second team meeting with her at his house. (Krouner Decl., ¶ 3.) The information that Plaintiffs seek to elicit during the deposition is relevant to this claim. See In re Subpoena Issued to Dennis Friedman, 350 F.3d 65, 69 (2d Cir. 2003) (to meet its relevance burden, a party need establish only that the subpoenaed information is relevant to any claim or defense); Paws Up Ranch, LLC v. Green, 2013 WL 6184940, at *4 (D. Nev. Nov. 22, 2013) (denying motion to quash a non-party subpoena because "Plaintiffs have articulated several issues for which these documents [were] relevant").

Consequently, the Court should compel Ms. Sturtevant to comply with the Subpoena.

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C. Ms. Sturtevant Should Be Compelled To Produce Requested Documents Two Weeks Prior To The Deposition.

Rule 45 of the Federal Rules of Civil Procedure authorizes the issuance of a subpoena seeking the production of documents from a nonparty. A subpoena should designate with reasonable particularity the documents, things and electronically stored information that are to be produced by the party upon whom it is served. See Wright & Miller, 9A Fed. Prac. & Proc. Civ. § 2457 (3d ed.) (2017). In the present case, the Subpoena required Ms. Sturtevant to produce:

> 1. Current copy of … *curriculum vitae* or resume.
>
> 2. For the period of January 1, 2012, to the present, a copy of all documents concerning any communications including without limitation, letters, Facebook messages, emails, twitter messages and text messages, between [her] and: a) Kurt Ludwigsen; b) Verified Call; c) any student-athlete at Nyack College; d) any member of the press concerning Kurt Ludwigsen; and e) any other person or entity concerning Kurt Ludwigsen.
>
> 3. A copy of all documents concerning [her] travel to New York and/or New Jersey (*i.e.* travel itineraries, rental car agreements, *etc.*) in February 2015, when [she] stayed at the residence of Kurt Ludwigsen, in Ridgewood, New Jersey (the "February 2015 Trip").
>
> 4. A copy of all documents cornering [her] professional appointment or professional activities during the February 2015 Trip.
>
> 5. For the period of January 1, 2012, to the present, a copy of all documents concerning [her] speaking engagements at any college and/or university other than Nyack College.
>
> 6. For the period of January 1, 2012, to the present, a copy of all documents concerning any money paid to [her] by Kurt Ludwigsen.
>
> 7. For the period of January 1, 2012, to the present, a copy of all documents concerning any money paid to [her] by Verified Call.
>
> 8. For the period of January 1, 2012, to the present, a copy of all documents concerning any promotional or convention events that [she] attended at which Kurt Ludwigsen was also present.
>
> 9. All photographs of Kurt Ludwigsen.

10. All photographs concerning the February 2015 Trip.

(Krouner Decl., Exhibit A.)

Plaintiffs' Subpoena designates with reasonable particularity the documents, things and electronically stored information that Ms. Sturtevant was required to produce.[1] Ms. Sturtevant repeatedly failed to comply with the Subpoena. Ms. Sturtevant should be compelled to produce requested documents two weeks prior to her deposition; otherwise, Plaintiffs will be unable to adequately prepare for the deposition.

II. THIS COURT IS THE PROPER VENUE FOR ENFORCING THE SUBPOENA AGAINST A NON-PARTY.

Under Rule 45(a)(2), "[a] subpoena must issue from the court where the action is pending." Fed. R. Civ. P. 45(a)(2). The subpoena may specify a "[p]lace of [c]ompliance" that is "within 100 miles of where the person resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(1)(a). Where the commanded party objects to a subpoena, Rule 45(d)(2)(B)(i) allows the serving party "[a]t any time, on notice to the commanded person" to "move the court for the district where compliance is required for an order compelling production or inspection." Fed. R. Civ. P. 45(d)(2)(B)(i).

Addressing the issue, the Eastern District of New York recently explained:

> [P]rior to the 2013 amendments to Rule 45, a subpoena duces tecum was required to be issued "from the court for the district where the production or inspection is to be made," Fed. R. Civ. P. 45(a)(2) (2007), rather than from the court where the action was pending. The prior version of Rule 45 also specified that "the serving party may move the issuing court for an order compelling production or inspection." Fed. R. Civ. P. 45(c)(2) (B)(i) (2007). In other words, under the prior version of Rule 45, the issuing court and the court of compliance were the same. In contrast, under the current version of Rule 45, the issuing court is the court where the litigation is

[1] At a conference on February 21, 2018, Defendants' counsel confirmed to the Court that they have no objection to the enforcement of the Subpoena. (See Transcript of February 21, 2018 Court Conference, Davidson, J., pp. 30:20-32:15, a copy of which is annexed to the Krouner Decl. as Exhibit E.)

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> pending. Nonetheless, under both the prior and current versions of Rule 45, the court for the district where compliance is required is the proper venue for a motion to compel.

JMC Restaurant Holdings, LLC v. Pevida, 2015 WL 2240492, at *3 (E.D.N.Y. 2015) (Scanlon, J.).

In JMC Restaurant Holdings, the Eastern District found that the proper venue for compelling a deposition in Manhattan was the Southern District of New York, even when the subpoena was issued by the Eastern District of New York. Id. at **3-4. Numerous other recent cases came to the same conclusion. See KGK Jewelry LLC v. ESDNetwork, 2014 WL 1199326, at *2 (S.D.N.Y. 2014) ("After the 2013 amendments, Rule 45 now requires subpoenas to issue from 'the court where the action is pending,' Fed. R. Civ. P. 45(a)(2), but still reserves the power to quash or modify a subpoena to the 'court for the district where compliance is required,' Fed. R. Civ. P. 45(d(3)).").

Similarly, this Court has found that "[w]hile the court where the action is pending issues subpoenas, the authority to adjudicate a motion to compel arising out of those subpoenas is vested with the court where compliance is required." Argento v. Sylvania Lighting Services Corp., 2015 WL 4918065, at *3 (D. Nev. August 18, 2015); Bridge v. Credit One Financial, 2015 WL 3938367, at *1 (D. Nev. June 25, 2015) ("[T]his Court lacks jurisdiction to resolve a motion to quash [a non-party subpoena] when the place where compliance is required is located in another district."); Agincourt Gaming, LLC v. Zynga, Inc., 2014 WL 4079555, at *3 (D. Nev. Aug. 15, 2014) ("The previous version of Rule 45 provided that the issuing court possesses jurisdiction to quash or modify subpoenas, whereas the current version of the Rule provides that the court for the district where compliance is required has jurisdiction to quash or modify subpoenas.") (citations and quotation marks omitted).

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Here, the subpoena calls for Ms. Sturtevant's subpoena compliance, in Las Vegas, Nevada, where Ms. Sturtevant resides. Consequently, the proper venue for enforcement of the subpoena is the United States District Court for the District of Nevada.

Consequently, this Court is the proper venue for enforcing the Subpoena against a non-party.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion to compel deposition subpoena should be granted.

Dated this 27th day of March, 2018.

REISMAN SOROKAC

/s/ Joshua H. Reisman, Esq.
JOSHUA H. REISMAN, ESQ.
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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

A. DOE, E. DOE, K. DOE, M. DOE, S. DOE, Y. DOE, Plaintiffs, -against- KURT LUDWIGSEN, in his individual capacity, KIRSTEN LAMBERTSON, in her individual capacity, MICHAEL G. SCALES, individually and as President of Nyack College, DAVID C. JENNINGS, individually and as Executive Vice President of Nyack College, KEITH DAVIE, individually and as Athletic Director for Nyack College, AMANDA AIKENS, individually and as Assistant Athletic Director for Nyack College, TAYLOR BROWN, individually and as Assistant Softball Coach for Nyack College, KAREN DAVIE, individually and as Director of Human Resources and Title IX Coordinator for Nyack College, NYACK COLLEGE, and DOES 1-10, Defendants.	**DECLARATION OF TODD J. KROUNER IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL SUBPOENA COMPLIANCE**

I, Todd J. Krouner, Esq., do declare and state the following under penalty of perjury:

1. I am the attorney for the plaintiffs in the actions brought in the United States District Court for the Southern District of New York.

2. I submit this declaration in support of plaintiffs' Motion to Compel Subpoena Compliance. I base this declaration upon personal knowledge and a review of my office's case file.

3. This is the case against Nyack College, its former softball coach Kurt Ludwigsen, and multiple Nyack College defendants. One the allegations in this case that defendant Kurt Ludwigsen brought a porn star, known as Allie Haze, to meet with plaintiffs on Nyack College's campus, and later, had at least two plaintiffs to meet with Allie Haze in his office, after a second team meeting with her at his house. The allegations are relevant, inter alia, to claims of sexual harassment, arising under Title IX, where it is alleged that Defendant Ludwigsen was grooming members of his softball team for the adult entertainment industry. Moreover, where Nyack College branded itself as "New York's Christian College," and explicitly prohibited the promotion of pornography, the three sets of meetings with the porn star also support plaintiffs' claims for negligent supervision.

4. On or about October 26, 2017, I caused to be issued a subpoena ad testificandum and duces tecum, addressed to Brittany Sturtevant ("Ms. Sturtevant"), a.k.a. Allie Haze (the "Subpoena"). The Subpoena called for her deposition on December 18, 2017, in Las Vegas, Nevada, where she resides. A copy of the Subpoena is annexed hereto as Exhibit A.

5. On or about November 2, 2017, Ms. Sturtevant was served with the Subpoena. A copy of Proof of Service is annexed hereto as Exhibit B.

6. On or about December 5, 2017, Ms. Sturtevant called my office and informed my legal assistant, Julia Gallo ("Ms. Gallo"), that she was seeking an attorney to represent her at the deposition. Ms. Sturtevant also stated that she could not confirm her availability for December 18, 2018. Ms. Sturtevant said she would get back to Ms. Gallo with the dates of her availability on or before December 14, 2017.

7. On or about December 6, 2017, Ms. Gallo sent Ms. Sturtevant a letter confirming her telephone conversation on December 5, 2017. Ms. Gallo also stated that if Ms. Sturtevant got back to us on December 14, 2017, it would only leave us four days to confirm her deposition, which would be insufficient. Consequently, Ms. Gallo asked Ms. Sturtevant to provide us with the dates of her availability in January 2018. A copy of Ms. Gallo's December 6, 2017 letter is annexed hereto as Exhibit C.

8. After not hearing from Ms. Sturtevant, on or about December 14, 2017, Ms. Gallo called her and left a voicemail.

9. Ms. Gallo called Ms. Sturtevant, again, six more times, on or about December 18, 2017, January 10, 2018, January 17, 2018, January 29, 2018, February 6, 2018 and February 8, 2018.

10. Ms. Gallo also sent Ms. Sturtevant three emails, on or about January 11, 2018, January 26, 2018 and February 8, 2018. In Ms. Gallo's January 26, 2018 and February 8, 2018 emails, Ms. Gallo stated that all attorneys of record are available for her deposition in Las Vegas, Nevada, on March 27, 2018, March 28, 2018 and March 29, 2018. Ms. Gallo asked Ms. Sturtevant to confirm her availability for any of these dates. Copies of Ms. Gallo's emails are annexed hereto collectively as Exhibit D.

11. To date, neither Ms. Sturtevant, nor any attorney on her behalf, has replied. Consequently, Plaintiffs seek an Order compelling Ms. Sturtevant's videotaped deposition on April 30, 2018, at the Reisman Sorokas law office, in Las Vegas, Nevada, and, compelling production of all responsive documents to the subpoena by 5 P.M. on April 16, 2018.

12. At a conference before the Court on February 21, 2018 (the "Conference"), Defendants' counsels confirmed that they have no objection to the enforcement of the Subpoena. A copy of the Conference transcript is annexed hereto as Exhibit E, pp. 30:20-32:15.

13. A prior request for the relief sought herein was made previously to the Hon. Paul Davison, United States Magistrate Judge, Southern District of New York, who is presiding over the discovery of these actions. By Order dated March 8, 2018, Magistrate Judge Davison denied plaintiffs' motion without prejudice. A copy of his Order is annexed hereto as Exhibit F.

Executed on this 20th day of March, 2018

/s/Todd J. Krouner
Todd J. Krouner (TK0308)

EXHIBIT A

AO 88A (Rev. 12/13) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of New York

A. Doe, E. Doe, K. Doe, M.Doe, S. Doe, Y. Doe
Plaintiff
v.
Kurt Ludwigsen
Defendant

Civil Action No. 7:15-cv-07827

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Brittany Sturtevant

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:
Reisman Sorokas 8965 South Eastern Avenue, Suite 382 Las Vegas, NV 89123	12/18/2017 10:00 am

The deposition will be recorded by this method: stenography

☑ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: See Attachment I.

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 10/26/2017

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Todd J. Krouner
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* A. Doe, E. Doe, K. Doe, M. Doe, S. Doe, Y. Doe, who issues or requests this subpoena, are:

Todd J. Krouner, 93 North Greeley Avenue, Chappaqua, NY 10514, tkrouner@krounerlaw.com, 914-238-5800

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 7:15-cv-07827

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

☐ I served the subpoena by delivering a copy to the named individual as follows: _____

_____

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT I

1. Current copy of your *curriculum vitae* or resume.

2. For the period of January 1, 2012, to the present, a copy of all documents concerning any communications including without limitation, letters, Facebook messages, emails, twitter messages and text messages, between you and:

a) Kurt Ludwigsen;

b) Verified Call;

c) Any student-athlete at Nyack College;

d) Any member of the press concerning Kurt Ludwigsen; and

e) Any other person or entity concerning Kurt Ludwigsen.

3. A copy of all documents concerning your travel to New York and/or New Jersey (*i.e.* travel itineraries, rental car agreements, *etc.*) in February 2015, when you stayed at the residence of Kurt Ludwigsen, in Ridgewood, New Jersey (the "February 2015 Trip").

4. A copy of all documents concerning your professional appointment or professional activities during the February 2015 Trip.

5. For the period of January 1, 2012, to the present, a copy of all documents concerning your speaking engagements at any college and/or university other than Nyack College.

6. For the period of January 1, 2012, to the present, a copy of all documents concerning any money paid to you by Kurt Ludwigsen.

7. For the period of January 1, 2012, to the present, a copy of all documents concerning any money paid to you by Verified Call.

8. For the period of January 1, 2012, to the present, a copy of all documents concerning any promotional or convention events that you attended at which Kurt Ludwigsen was also present.

9. All photographs of Kurt Ludwigsen.

10. All photographs concerning the February 2015 Trip.

EXHIBIT B

Civil Action No. 7:15-cv-07827

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* BRITTANY STURTEVANT on *(date)* Nov 2, 2017, 3:50 pm.

[X] I served the subpoena by delivering a copy to the named individual as follows: SEE BELOW on *(date)* Tue, Nov 07 2017; or

[ ] I returned the subpoena unexecuted because: _____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ 36.77.

My fees are $ _____ for travel and $ _____ for services, for a total of $ $50.00.

I declare under penalty of perjury that this information is true.

Date: NOVEMBER 8, 2017

Stephen t. Popovich

Server's signature

STEPHEN T. POPOVICH R-063607

Printed name and title

ACE Executive Services, LLC (NV #2021C)
8275 S EASTERN AVE STE 200
LAS VEGAS, NV 89123
702 919-7223
Job: 1779205

Server's address

Additional information regarding attempted service, etc.:
1) Unsuccessful Attempt: Nov 5, 2017, 9:37 am PST at 7015 CORDITE RD, LAS VEGAS, NV 89178
Could not get to front door - locked gate; door bell missing; left notice
called 818 934-6969 - no message or i.d.; mail box full
called 909 659-3450 - no message or i.d - left message

2) Successful Attempt: Nov 7, 2017, 9:43 am PST at 7015 CORDITE RD, LAS VEGAS, NV 89178 received by BRITTANY STURTEVANT. Age: 20s; Ethnicity: Caucasian; Gender: Female; Weight: 140; Height: 5'10"; Hair: Black;

EXHIBIT C

LAW OFFICE OF TODD J. KROUNER, P.C.
93 NORTH GREELEY AVENUE
CHAPPAQUA, NEW YORK 10514
(914) 238-5800

TODD J. KROUNER*

*ADMITTED IN NY & NJ

December 6, 2017

VIA EMAIL AND FIRST CLASS MAIL

Ms. Brittany Sturtevant
7015 Cordite Road
Las Vegas, Nevada 89178

Re: Does v. Ludwigsen

Dear Ms. Sturtevant:

Further to our telephone conversation yesterday, I understand that presently you are unable to confirm your availability for your deposition on December 18, 2017, in Las Vegas.

I also understand that you are seeking legal representation concerning your subpoena, and get back to me on December 14, 2017, to confirm your availability. However, this would leave us with only four days to confirm the deposition on December 18, 2017, which is not sufficient. Consequently, please provide us with dates of your availability, on Monday or Friday, in January 2018.

Finally, please feel free to have your attorney to contact us concerning the foregoing.

I look forward to hearing from you.

Best regards.

Very truly yours,

Julia Gallo
Executive Assistant to Todd J. Krouner

TJK/jg

cc: Carla Varriale, Esq.
Michael Burke, Esq.
(via e-mail only)

EXHIBIT D

Julia Gallo

From: Julia Gallo
Sent: Thursday, January 11, 2018 11:10 AM
To: 'brittanyjoyinfo@gmail.com'
Cc: Todd J. Krouner
Subject: Does v. Ludwigsen

Tracking:

Recipient	Delivery	Read
'brittanyjoyinfo@gmail.com'		
Todd J. Krouner	Delivered: 1/11/2018 11:10 AM	Read: 1/11/2018 12:32 PM

Dear Ms. Sturtevant:

As I indicated in my voicemail, February 19 and February 23 for your deposition do not work for all of the attorneys in the case.

Please advise whether or not you are available the week of February 12, 2018 (any day, not just Monday and Friday). Otherwise, please provide more dates for your availability.

Best regards,

Julia Gallo
Executive Assistant to Todd J. Krouner

Law Office of Todd J. Krouner, P.C.
93 North Greeley Avenue
Chappaqua, New York 10514
Telephone: (914) 238-5800
jgallo@krounerlaw.com
www.Krounerlaw.com

Julia Gallo

From: Julia Gallo
Sent: Friday, January 26, 2018 5:51 PM
To: brittanyjoyinfo@gmail.com
Cc: Todd J. Krouner
Subject: Does v. Ludwigsen

Tracking:	**Recipient**	**Delivery**	**Read**
	brittanyjoyinfo@gmail.com		
	Todd J. Krouner	Delivered: 1/26/2018 5:51 PM	Read: 1/26/2018 6:23 PM

Dear Ms. Sturtevant:

All attorneys of record are available for your deposition in Las Vegas, Nevada, on March 27, 2018, March 28, 2018 or March 29, 2018.

Please advise which of these dates is preferable for you.

Best regards,

Julia Gallo
Executive Assistant to Todd J. Krouner

Law Office of Todd J. Krouner, P.C.
93 North Greeley Avenue
Chappaqua, New York 10514
Telephone: (914) 238-5800
jgallo@krounerlaw.com
www.Krounerlaw.com

Julia Gallo

From: Julia Gallo
Sent: Thursday, February 08, 2018 5:32 PM
To: brittanyjoyinfo@gmail.com
Cc: Todd J. Krouner
Subject: Does v. Ludwigsen

Tracking:

Recipient	Delivery	Read
brittanyjoyinfo@gmail.com		
Todd J. Krouner	Delivered: 2/8/2018 5:32 PM	Read: 2/8/2018 5:50 PM
Jessica Yanefski	Delivered: 2/8/2018 5:32 PM	Read: 2/8/2018 6:37 PM
jreisman@rsnvlaw.com		

Dear Ms. Sturtevant:

Further to my assistant's voicemails on January 29, 2018, February 6, 2018 and today, and mindful of our court conference tomorrow, please advise whether any of March 27, 2018, March 28, 2018 or March 29, 2018 are convenient for your deposition.

If we do not hear from your by tomorrow, we shall be forced to seek the assistance of the Federal Court to compel your deposition.

Very truly yours,

Todd Krouner (from the desk of Julia Gallo)

Julia Gallo
Executive Assistant to Todd J. Krouner

Law Office of Todd J. Krouner, P.C.
93 North Greeley Avenue
Chappaqua, New York 10514
Telephone: (914) 238-5800
jgallo@krounerlaw.com
www.Krounerlaw.com

EXHIBIT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

A. DOE, E. DOE, K. DOE, M. DOE, S. DOE and Y. DOE.

Plaintiffs,

-against- 15 Civ. 7822(CS)(PED)

KURT LUDWIGSEN, in his individual capacity, KIRSTEN LAMBERTSON, in her individual capacity, MICHAEL G. SCALES, individually and as President of Nyack College, DAVID C. JENNINGS, individually and as Executive Vice President of Nyack College, KEITH DAVIE, individually and as Athletic Director for Nyack College, TAYLOR BROWN, individually and as Assistant Softball Coach for Nyack College, KAREN DAVIE, individually and as Director of Human Resources and Title IX Coordinator for Nyack College, NYACK COLLEGE and DOES 1-10,

Defendants.

----------x

United States Courthouse
White Plains, New York
February 21, 2018

B e f o r e:
HONORABLE PAUL E. DAVISON,
United States Magistrate Judge

A P P E A R A N C E S:

LAW OFFICE OF TODD J. KROUNER
Attorneys for Plaintiffs
93 North Greeley Avenue, Suite 100
Chappaqua, New York 10514
BY: TODD J. KROUNER
JESSICA YANEFSKI

HAVKINS ROSENFELD RITZERT & VARRIALE
Attorneys for Nyack College
One Battery Park Plaza, Sixth Floor
New York, New York 10004
BY: MICHELLE L. BOCHNER

BURKE MIELE & GOLDEN LLP
Attorneys for Kurt Ludwigsen
40 Matthews Street, Suite 209
Goshn, New York 10924
BY: MICHAEL K. BURKE

THE CLERK: In the matter of K. Doe, et al. versus Kurt Ludwigsen, et al.

Counsel, please stand and note your appearance for the record.

MR. KROUNER: Todd J. Krouner and Jessica Yanefski for the plaintiffs from the Law Office of Todd J. Krouner PC.

THE COURT: Welcome, counsel.

MR. KROUNER: Thank you.

MS. BOCHNER: Good afternoon, Michelle Bochner, Havkins Rosenfeld Ritzert & Varriale for the Nyack College defendants.

THE COURT: Good afternoon.

MR. BURKE: Good afternoon, your Honor. Michael Burke, Burke Miele & Golden, on behalf of Kirk Douglas.

THE COURT: Good afternoon, Mr. Burke.

All right, we are gathered for what is, by my rough count, twentieth discovery related conference in this case, the fifth in person of such gathering; and it is in response to a series of communications that I think began with Ms. Bochner's letter dated February 5th and there are a series of letters back and forth since that first letter.

So I guess you go first, Ms. Bochner.

MS. BOCHNER: Thank you, your Honor. The issue currently at hand is certain emails. Back in July 2017 and earlier, as far as the start of discovery, defendants requested

from plaintiffs all of their email communications. We were provided with snippets of various emails and we were not provided with any privilege logs.

Recently, in closing out discovery, our office came into the possession of all of the plaintiff's Nyack.edu emails.

THE COURT: How did that happen?

MS. BOCHNER: Our client is in possession of the Nyack.edu emails on their server. According to the handbook, they have access to these emails. Plaintiffs never demanded copies of their own emails from us. In contrast, we did demand copies of all of plaintiff's emails from the plaintiffs and were not provided with complete copies.

THE COURT: Do they have a server, as far as you know?

MS. BOCHNER: Well, the plaintiffs have access to their own emails so -- they all testified that they had access to their Nyack.edu emails and could go on and delete them, send emails from them at their depositions, which is then when we sent demands of each plaintiff for their Nyack.edu emails.

THE COURT: Go ahead.

MS. BOCHNER: So in the light of continued disclosure, we produced upon plaintiff's counsel all of their Nyack.edu emails along with a privilege log --

THE COURT: Let me go back to something. You think that notwithstanding the fact that your client is in control of

the server that these individual plaintiffs -- what's your basis for thinking they have access to all their prior emails?

MS. BOCHNER: They testified that they have access to their emails.

THE COURT: To all their prior emails?

MS. BOCHNER: They have --

THE COURT: I mean --

MS. BOCHNER: Yes. Aside from --

THE COURT: Aside from what --

MS. BOCHNER: -- what they deleted.

THE COURT: Right. But, you know, many people customarily delete their emails after they read them or after -- periodically; isn't that right?

MS. BOCHNER: I don't believe we produced emails that were deleted. We produced emails from the Nyack.edu email address.

In any event, we demanded this on plaintiff. Plaintiff did not respond with, plaintiffs do not have access. They responded with snippets and certain emails that they chose to provide in response to our demand. They did not provide a privilege log to emails which are presumably within their email account. We produced all the non-privileged emails to plaintiffs along with a privilege log which contained approximately 190 emails which are between various plaintiffs and plaintiffs' counsel. These emails were not reviewed,

however, based upon the clear language of the Nyack College handbook, as well as case law in this circuit, the emails are not entitled to attorney-client privilege because any privilege was waived by using these.

THE COURT: All right, before we get to issues of the privilege and whether it was waived, I think I'd like to hear from plaintiffs' counsel on the issue of whether this is simply filling in material that was demanded from plaintiffs and not produced.

MS. YANEFSKI: Ms. Yanefski, your Honor, for the plaintiffs.

THE COURT: Sure.

MS. YANEFSKI: The short answer is no. The recollection by Ms. Bochner that her office requested the emails from the plaintiffs of their Nyack.edu accounts at the depositions is not my recollection upon reviewing the record. My recollection is that plaintiffs --

THE COURT: Was it your recollection or have you reviewed the record?

MS. YANEFSKI: I reviewed the record. That plaintiffs are the ones who requested the Nyack.edu email accounts at the depositions because defendants, Nyack College, had custody and control over those emails and that Mr. Burke then joined in on that request.

But simply it's preposterous and confusing where

Ms. Bochner admits that Nyack College had custody and control of these emails at all times and she doesn't proffer any sort of scenario where they had not been accessible and now are accessible. They were theirs at all times, and regardless of whether or not the plaintiffs ever were asked to produce, which I don't believe that they were, these emails, these are emails that, if defendants ever intended to use them, they should have put them in their Rule 26(a) disclosures.

THE COURT: I get that, and what I'm trying to figure out is whether this represents, this eleventh hour, 11:59 hour disclosure of these emails from Nyack College's custody and control, whether that represents an outrageous discovery violation by defendants or whether on the other hand they're backing and filling something that was requested from plaintiffs that plaintiffs could have produced and didn't produce.

MS. YANEFSKI: That was requested of plaintiffs?

THE COURT: Yes.

MS. YANEFSKI: I would say that your Honor is correct with the former that this is an outstanding eleventh hour discovery production where plaintiffs requested the emails of defendants at the time of their deposition, and further, plaintiffs requested in our first discovery demand all documents and communications by the Nyack College individual defendants, anyone in that administration, and we were told

that there were no documents responsive to the request, we never saw those --

THE COURT: That's a separate issue though. Okay, I hear you on this.

Ms. Bochner, this is knowable. Is this something that defendants demanded or not?

MS. BOCHNER: Your Honor, defendants did demand this on July 17, 2017 to K. Doe in post-deposition demands.

THE COURT: You're talking very fast.

MS. BOCHNER: Sorry, I apologize. July 17, 2017, defendant served post-deposition demands on K. Doe, which, demanded any and all email correspondence from K. Doe's Nyack College accounts. That was just to K. Doe. Demanding -- defendant was never served with demands for plaintiffs' own emails. Plaintiffs testified that they had their emails. We were provided with certain emails in response to this demand, emails which were picked and chosen by plaintiffs' counsel.

THE COURT: You demanded all emails --

MS. BOCHNER: Correct.

THE COURT: -- that they --

MS. BOCHNER: From the Nyack College email accounts and plaintiffs.

THE COURT: And what did plaintiffs -- I mean, that on its face sounds like an outrageously broad demand. What was the response?

MS. BOCHNER: Plaintiffs provided emails that related to the 2014/2015 softball and the individuals whom they believed this was related to.

We believe that they're all relevant because of the emotional damages and the claims that plaintiffs are making as far as damages makes all of these emails discoverable to see how they were affected in their life when they are testifying that their school work was harmed, their relationship with their friend, their relationships with their family, their relationships with their church and their religion (unintelligible) all of their emails and the way they were communicating and corresponding with others at issue.

It was plaintiffs' burden to produce their emails, aside from the demand that was served upon them, it was plaintiffs' burden to produce their own emails according to Rule 26, and the fact that they picked and chose --

THE COURT: It's their burden to produce their own -- what does that mean according to Rule 26?

MS. BOCHNER: It's a discoverable item.

THE COURT: Every time in every case Rule 26 requires everybody to serve -- to give the other side all their emails?

MS. BOCHNER: When we requested all of their emails.

THE COURT: What did plaintiffs' counsel respond to that request?

MS. BOCHNER: I don't have the formal response in

front of me but they did not --

THE COURT: In other words, did they interpose objections and say, we're giving you the ones that involve the softball team or did they say, these are all of them and only gave you some of them.

MS. BOCHNER: No, they only produced some emails.

THE COURT: But did they interpose objections?

MS. BOCHNER: They did interpose objections, and then they provided certain emails. We don't know which emails are left out --

THE COURT: So your remedy at that time would have been to write me a letter saying they're improper, in your view, they're improperly withholding emails about other subjects that might shed light on their damages or whether they're -- been affected in the ways that they claim. Isn't that right?

MS. BOCHNER: That's correct. We went back and forth on the issue many times as far as social media records, letters back and forth as far as emails and what was being disclosed, and we kept getting additional responses, here's further emails, here's further social media requests, and, no, we did not come back and burden the Court as far as the emails. It wasn't our intention to do a eleventh-hour email drop, it's that we came into possession of these emails --

THE COURT: You keep saying, we came into possession

of them as though somebody left them on your doorstep at midnight or something. Your client had them, they were on the server. You, for whatever reason, didn't access that until the end of discovery.

MS. BOCHNER: We did not. The way that it came about that we did seek out and access the emails, because we were not served with a demand by plaintiffs for these emails, is that at the deposition of a non-party -- are we using -- K with a -- are we using (inaudible).

MR. BURKE: I guess K.L.

MS. BOCHNER: K.L.

THE COURT: Who is not Kirsten Lambertson.

MS. BOCHNER: Correct. Is not Kirsten Lambertson, who is a non --

MR. BURKE: Or Kurt Ludwigsen.

THE COURT: Or Kurt Ludwigsen.

MR. KROUNER: Or Y. Doe with the same initials.

THE COURT: Okay.

MS. BOCHNER: So at her deposition, the subject of emails came about in her Nyack.edu emails and Ms. Varriale, the attorney from my office who was doing the deposition, asked her that she would be requesting copies of her Nyack.edu emails, and Ms. K.L. responded, you have those, you should be able to access them, upon which Mr. Krouner said, yes, you should be able to get access to your own emails.

It was at that time we reached out to the IT department at Nyack College and we asked them, do we have access to these without authorization.

THE COURT: When was that?

MR. BURKE: That was recent.

MS. BOCHNER: It was in November or December of this year was this deposition. We reached out to the IT department to determine whether we could, in fact, get the Nyack.edu emails without any authorizations from plaintiffs since they were never provided with authorizations, and the IT department --

THE COURT: Had you requested authorizations for the emails on the server?

MS. BOCHNER: We didn't because we were never asked to produce the emails, so we didn't seek out authorizations to provide plaintiffs with their own emails, presumably they had access to their own emails which is why we demanded their emails from them. When we did get possession of these emails after reaching out to the IT department, we disclosed them.

THE COURT: And within that universe of thousands of emails is nestled this smaller selection of emails which you have identified as potentially privileged.

MS. BOCHNER: Correct. And I will admit that many of the thousands of emails are not relevant, they don't involve softball or what took place in 2014/2015.

THE COURT: So if they're not relevant, you really couldn't have expected plaintiffs to produce them.

MS. BOCHNER: Except we did demand all emails.

THE COURT: Even though you just said they weren't relevant.

MS. BOCHNER: Correct.

MR. BURKE: Only after review though.

MS. BOCHNER: Only after review. It was our -- we demanded them. It's now our opinion that many of them aren't relevant, but plaintiff didn't give us that opportunity to determine that. Plaintiff made the decision on their own, as well as deciding on their own not to produce a privilege log. They chose just not to tell us about emails that did relate to the lawsuit likely because of the dates of the emails. They just opted to not provide anything to us.

Now all we can go on the privilege emails is the date of the email, and our presumption is that, if something was sent between 2014 and 2017 from a Nyack dot email, it may relate to --

THE COURT: And it goes to Mr. Krouner's office.

MS. BOCHNER: Correct. Though that's all we know right -- that's all we know about these emails is the date of them and who they're to and who they're from. We have no idea the rest of the subject nature of them.

THE COURT: Right. But you don't have any reason to

think that they have any other relationship apart from attorney-client.

MS. BOCHNER: No, apart from the lawsuit. Oh, no, except the position, our argument that any emails sent through the Nyack email server have waived the privilege.

Plaintiffs all testified that they had other emails which, I'm not arguing if they've waived any privilege on private Gmail accounts or Yahoo accounts, which they all testified to having, and we also requested emails from those accounts, it's just -- and there was no privilege log provided for that either, but specifically the Nyack.edu emails are not entitled to any privilege and they voluntarily waived that privilege by using that email.

THE COURT: What I'm still stuck on is why is it okay for Nyack College to sit on this trove of emails and based on the -- if it is true, as apparently is stated in the student handbook, and I'm looking for where you quote this, if it is true that extra copies of all data are kept in the routine process of back-up and that consequently deletions of online files by a user does not mean that no other copy remains, that that suggests to me, if it's true, that your client has a more comprehensive collection of these emails than could likely be found anywhere else.

MS. BOCHNER: Yes, your Honor, but it's not our burden to provide plaintiff with this discovery that wasn't

requested from us. These are -- this is something that we requested from plaintiff.

THE COURT: Well if it's something that you want to use, then it's supposed to be disclosed in initial disclosures or at least described there and, you know, what you're telling me is that counsel for Nyack College never knew that they had all this until sometime presumably very shortly before you turned it over to Mr. Krouner.

MS. BOCHNER: Correct. We continued to ask for these emails from the plaintiffs' attorney.

THE COURT: I want to hear from plaintiffs' counsel about your version of how this issue of plaintiffs' Nyack.edu emails was handled.

MS. YANEFSKI: Very briefly at the outset, plaintiffs don't want -- don't care about these emails, we don't want these emails that are currently being produced in the action we would like them precluded because of timing.

So it's outrageous that defendants didn't bring these up in their Rule 26(a) initial disclosures, and they should be time barred on that grounds alone, and then where plaintiffs then demanded access and emails to the defendant administrators, Nyack.edu emails --

THE COURT: Again, let's leave the administrators out of it.

MS. YANEFSKI: Sure.

THE COURT: Let's focus on the ones that are generated by the plaintiffs.

MS. YANEFSKI: Right. So the plaintiffs are not in the same position as defendants to have access to and be able to produce these emails where defendants say in their handbook that they have them on hand --

THE COURT: I get that, so defendants requested that your clients produce all of their emails. You objected to that but said, we'll give you the emails that have to do with the softball team; is that what happened?

MS. YANEFSKI: I apologize that I don't have more specific answer about that for your Honor, because this is the first that I'm hearing from defendants' counsel about this issue being one of plaintiffs' deficiencies. That wasn't mentioned in the first letter to the Court or in the amended letter to the Court that was submitted last Wednesday. The --

THE COURT: I think it's in there somewhere, although it's buried, but I regard this as very consequential. If plaintiffs received these demands, produced some emails, acknowledged that there were others that were being withheld on relevance grounds, and if that was the subject of some back and forth, that's one thing. If on the other hand, as Ms. Bochner is suggesting, it was demanded and just never produced by plaintiffs, that's something else again.

MS. YANEFSKI: As far as plaintiffs are aware, we've

produced all relevant and responsive email communications to defendants in response to all of their demands.

THE COURT: Again, relevant as defined by plaintiffs, but transparently defined, is that what you're telling me?

I think, in order to resolve this issue, I need to see the correspondence back and forth on this.

MS. YANEFSKI: Of course, and we would welcome the opportunity to supplement this critical issue with your Honor.

THE COURT: I think that's what we have to do, because I think that it's going to come out differently depending on what those documents reveal. I don't think it's okay for defendants to sit on a comprehensive set of these emails, including materials that plaintiffs have refused to produce on relevance grounds, and quite possibly materials that plaintiffs may not even have access to anymore, and then pulled them out of the hat at the eleventh hour.

On the other hand, if plaintiffs were in violation of their discovery obligations, I suppose it becomes somewhat more justifiable for defendants to go look elsewhere.

So I guess what I need is further briefing on that issue. I would like to hear from defense counsel, I'm sorry from plaintiffs' counsel on this question of -- which I may or may not have to reach, which is the question of whether deploying this college email system in light of the disclaimers that are contained in the rule book or the student handbook

operates as a waiver of the attorney-client privilege. That you can address right now.

MS. YANEFSKI: Oh, sure. No, it's not a waiver of the attorney-client privilege. The defendants cite to a case that they contend is controlling in the Southern District, two cases actually, *In Re: Asia Global Crossing* and *In Re: Reserve Fund Securities and Derivative Litigation*. The test in those actions is a subjective one of what was the parties' reasonable expectation of privacy with the understanding of the complexities of an email server. The business executives in those two cases are going to have a very different expectation of privacy and an understanding of the complexities of modern communication than will college students who are just entering the world of CC and BCC and sensitive communications for the first time. The result is very different, and the fact is that our clients did not have an expectation that they were waiving any right to privacy over their emails. The --

THE COURT: Well, I mean, if they'd read confidential information relative to personal matters, internal investigations and litigation should not be transmitted, users should have no expectation of privacy while using institution-owned or institution-laced equipment, information passing through or stored on institution-owned equipment can and will be monitored. Nyack College maintains the right to monitor and review internet use and email communications sent

or received as necessary, i.e. for troubleshooting, retrieving business-related information, legal requests, et cetera. So if they read that, I'm not sure they would have had an expectation of privacy.

MS. YANEFSKI: If they read that, your Honor, and we don't know that they did. But if your Honor is of the opinion that the privilege between attorney and client is waived via transmission of such emails over the Nyack college servers, then we would seek those same emails between Nyack employees and their in-house counsel or out-of-house counsel on the email servers on the same grounds.

THE COURT: Well but it's too late for that; isn't it?

In any event, what I need -- and I was fully expecting to rule on this question today, but Ms. Bochner has introduced an additional element into it here. What I really need is a chronological, walk-me-through what was demanded and what the response was. I don't need to see all of everything that was produced, but if there were objections interposed and then some kind of a meet and confer resolving that, I need to know what it was and I think it has to be done with reference to the actual written communications and not every recollection now.

Fair enough?

MS. YANEFSKI: Yes, your Honor.

THE COURT: Ms. Bochner, the other issue relates to this Allyssa Perez?

MS. BOCHNER: Yes, your Honor. Allyssa Perez --

MS. YANEFSKI: I'm sorry, before we depart this issue, may I just confirm that Ms. Bochner's office will be making the opening salvo on these papers and we're provided with the opportunity to respond since this is Ms. Bochner's motion?

THE COURT: I don't really want argument. I want to know what plaintiffs asked for and what -- I'm sorry, what defendants asked for and what plaintiffs respond. If the two sides could get together and just create a sort of call-in response, that would be wonderful. If you can't work together on that, then, you know, just send me what you think the back and forth was.

MS. YANEFSKI: I appreciate the clarification.

THE COURT: I'm not looking for a back and forth or argument type of thing. I just want to know who said who -- what to who, and you can work out how to do it, and I think if there are going to be two submissions, they should be simultaneous.

MS. BOCHNER: Yes, your Honor.

THE COURT: How much time do we need to do something like that, a week?

MS. BOCHNER: A week.

MS. YANEFSKI: A week is fine.

THE COURT: A week.

So, back to you, Ms. Bochner. Ms. Perez.

MS. BOCHNER: The other issue relates to emails and documents that were demanded of plaintiffs' counsel between them and Ms. Allyssa Perez, a non-party witness in this case who was produced for a deposition following a subpoena by Mr. Krouner. Ms. Perez testified about various email correspondence and documents that were provided by herself to plaintiffs' counsel and individuals in his office.

We served demands on plaintiffs' counsel for emails, documents provided from Ms. Perez to plaintiffs' counsel that she testified about at her deposition, and the response we got was that these are attorney work product and they would not be turned over. We were given a privilege log from plaintiffs' counsel with 11 items that said attorney work product doctrine.

Following the deposition of Allyssa Perez, we also subpoenaed documents from Ms. Perez, which we have not received a response from; however, it's our position that there is no privilege between Mr. Krouner and this non-party, Allysssa Perez, based upon case law that's referenced in my letter that Ms. Perez is not a party to the action, she has no privity with Mr. Krouner, she -- they cannot assert work product over emails sent and information that Ms. Perez provided to plaintiffs counsel. She has no common interest as far as the parties in

this lawsuit. She, during her deposition testimony, made no claims concerning the subject matter of the lawsuits and we would therefore ask that the emails which have been included on the privilege log and provided to Mr. Krouner between Allysssa Perez and plaintiffs' counsel are not privileged, are not entitled to attorney work-product privilege and should be turned over to our office in the course of discovery and in response to the demands that we served.

THE COURT: Who wants to field this one?

MS. YANEFSKI: Maybe I can put this to rest very easily, your Honor. It's our understanding that Ms. Perez produced all of the emails that were subpoenaed from her today. I don't know if you've seen those yet, and that she didn't claim privilege. So I think that the issue is moot.

MS. BOCHNER: Your Honor, we have yet -- we have yet to receive anything, and, again, this only adds to the issue that Ms. Perez was not a non-party. She clearly is in communication with plaintiffs' --

THE COURT: Well, she is a non-party.

MS. BOCHNER: I mean that she is a non-party. She clearly has a relationship that plaintiffs' counsel appears to know that she provided us with certain documents, and that doesn't address the issue that there's no attorney work product.

THE COURT: Is this --

MS. BOCHNER: And plaintiffs' counsel should have given us this information.

THE COURT: There are 11 specified documents on that --

MS. BOCHNER: Privilege log.

THE COURT: -- privilege log.

MS. BOCHNER: Yes.

THE COURT: If she's given you all 11, does that put this to rest?

MS. BOCHNER: Assuming that it's complete copies of everything, which there's really no way to know whether Ms. Perez has provided us with complete copies. If all the pages are the same -- all we have is number of emails, we don't have the number of pages in those emails. So if we can be given some kind of information to compare and know that the information that Ms. Perez has allegedly provided us in response to the subpoena is exactly the same as the information that Mr. Krouner has, then that would likely put the issue to rest.

MR. KROUNER: Your Honor, I'm standing because I'm looking at an email from what appears to be Allysssa Perez to Brandon Smith, who is Ms. Bochner's paralegal, describing the attachment of a zip file with the subpoenaed records what appears to be 1:30 p.m. this afternoon.

MS. BOCHNER: Well, if that's the case --

THE COURT: Well -- right.

MR. KROUNER: Not -- not to harp on the timing and the fineness of who saw or read what, and not to step on my associate's representation on this issue, but the short point is two: One, I believe the materials, as of this moment, have been provided to defendants' counsel by Ms. Perez, period, full stop; two, in any event, I assert a work product doctrine privilege with respect to my communications with anybody concerning the subject matter of this lawsuit in the absence of a showing of hardship to the defendant Nyack College in this instance that they cannot otherwise get the material.

THE COURT: You know, it seems to me that you're arguing a completely moot point here if Ms. Perez has turned these materials over to defendants' counsel because clearly they're no longer confidential.

MR. KROUNER: That is the headline, your Honor. And we've been down this path before with another non-party witness in the form of Barbara McCarthy, and we sort of have a rhythm in this case in terms of defendants asking for materials from me concerning communications with non-parties and simultaneously subpoenaing and obtaining those materials from the third party.

So I'll take your Honor's observation and my indication of what I'm reading in the email that the materials have been --

THE COURT: All right. I think that, if the materials -- it seems to me unlikely that Ms. Perez has not provided the full panoply, but if there's something she's held out -- do you know if she's held anything out?

MR. KROUNER: I'm not aware of -- I am not aware of the assertion of any privilege on the part of Ms. Perez or any withholding of materials that have been requested of her pursuant to Nyack College's --

THE COURT: You're copied on what she's sent to Mr. Smith?

MR. KROUNER: Yes.

THE COURT: So you can go in there and figure out whether she left anything out.

MR. KROUNER: We have that capacity.

THE COURT: But I think, in light of this disclosure by the witness, I am unwilling to find any privilege associated with these communications, and at that point it would become a selective waiver problem and so forth, so if there's anything that's left out, you should give it to Ms. Bochner. Understood?

MR. KROUNER: Understood, your Honor.

MS. BOCHNER: Your Honor, just to add on this point as far as non-party disclosures, we also served upon plaintiffs' counsel which we -- I believe they requested additional time to respond by next week. We served a second

demand for information which also requested emails, communications back and forth between plaintiffs' counsel and various of the other non-parties.

Yes, we also served subpoenas on these individuals. We have yet to receive any responses to these subpoenas which were served over 30 days ago. So, again, the same issue would come up that these are not entitled to attorney -- presumably we're going to be provided with a privilege log regarding these communications from Mr. Krouner's office that look similar to the privilege log from Allyssa Perez that says attorney work product doctrine. And in that matter, we have not yet been provided nor have we received any indication that we will be provided with information in response to the subpoena. So we would again have to argue that there is no attorney work product for these individuals for documents that may have be sent by non-parties to Mr. Krouner related to the lawsuit related to testimony, preparation for testimony.

Again, this is premature because we've yet to receive a response from either Mr. Krouner's office or response to these well overdue subpoenas.

THE COURT: Who are these people?

MS. BOCHNER: Barbara McCarthy was a non-party, the mother of a non-party; K.L.; George Richards, the parents of one of the plaintiffs, M. Doe; Glenn Manger, the parents of one of the -- A. Doe; Doug Yano, the father of K. Doe --

THE COURT: Well, you know, this is becoming more complicated because, frankly, I could pretty easily see a distinction between a parent of a plaintiff who might very well have a common interest with the plaintiff as distinguished from somebody like Ms. Perez who seems to be a stranger to this controversy.

MS. BOCHNER: Understood, your Honor. So we have two individuals who are not, who can't conceivably have a common interest, K.L., who's a non-party, she was a student at Nyack College, she has no claims in this lawsuit, and Barbara McCarthy, whose daughter was a student at Nyack College, not a party to the lawsuit who testified --

THE COURT: Right, although Mr. Krouner explained to us last time we were here that with respect to Ms. McCarthy, if I recall correctly -- and you'll correct me if I'm wrong, Mr. Krouner -- there was at least preliminary discussion of Ms. McCarthy or her daughter who attended Nyack College becoming a plaintiff or something.

MR. KROUNER: Your Honor's recollection is correct.

MS. BOCHNER: That's correct, your Honor, but Ms. McCarthy's daughter is not a plaintiff. As far as we're aware, there are no actions, and Ms. McCarthy's daughter is an adult, therefore, any potential lawsuit by her mother we question what kind of lawsuit that would be and whether --

THE COURT: Again --

MS. BOCHNER: -- what kind of basis there is.

THE COURT: Again, I have to look at the cases, but it would be easy for me to see how a parent/daughter might create some kind of a common interest that would not be present in a different sort of relationship.

In any event, it's helpful to preview these issues for me. In light of the fact that we're here talking about them, maybe I can rule on the papers, but I'm not going to rule on it in an advisory way, because you're telling me that you haven't gotten responses yet, you haven't seen a privilege log and you don't know whether these witnesses are going to unilaterally respond to these subpoenas.

MS. BOCHNER: That's correct.

THE COURT: So I think what you're going to have to do is write to me if you need a ruling.

Mr. Krouner or Ms. Yanefski, is there anything else you want to say on this topic?

MR. KROUNER: Just one point of clarification. The information is slightly better that I believe plaintiffs' formal response to those demands, which Ms. Bochner was gracious enough to extend, was met yesterday by our office, so she should at least have our formal responses.

THE COURT: All right, so you'll let me know.

Mr. Krouner, you assert a work product privilege; do you acknowledge that that is somewhat intentioned with Judge

Rakoff's opinion in this *Gupta* case?

MR. KROUNER: I must confess I'm not familiar with Judge Rakoff's decision.

THE COURT: Okay, this is a decision that defense counsel discussed at some length in her letters. I don't know if counsel --

MR. KROUNER: I'm not prepared to speak to that.

THE COURT: Okay. All right. So I will await further information on that. I will hear from counsel in a week's time filling me in on the record with regard to requests and responses.

With regard to these emails, I usually try to rule on these things from the bench, but it seems to me like I don't have enough information to do so, so I'm going to reserve.

Anything else we can productively talk about today?

MS. BOCHNER: Your Honor, just checking in on the status of Mr. Krouner's motion for leave to amend because in light -- if it's going to produce or provide additional depositions that are necessary, we're obviously storming forward doing IMEs and expert exchange --

THE COURT: Plaintiffs' counsel has assured me that plaintiff will not be seeking any additional discovery on the basis of the amendment if granted. Are you telling me that --

MS. BOCHNER: Correct, which we've set forth in our opposition papers that we may need additional depositions of

the plaintiffs because the damages issue and specifically how they were damaged by these new claims against Kirsten Lambertson was not at all delved into. All of the damages revolved around Kurt Ludwigsen's conduct and none of it related to Ms. Lambertson's conduct.

THE COURT: You know, you're asking me, I'll get to it when I get to it.

MS. BOCHNER: I understand.

THE COURT: If we have to -- if that means other shoes drop, we'll deal with that. We'll cross that bridge when we come to it.

You're on your feet, Ms. Yanefski.

MS. YANEFSKI: I am. If your Honor is done with Ms. Bochner on this topic, I just didn't want to miss the opportunity to bring up another topic.

THE COURT: I'm listening.

MS. YANEFSKI: So we have two depositions in this action that haven't occurred, all the others have occurred. The first is schedule for tomorrow, David Julien, that should go as planned, but the second you'll recall that we had a subpoena for the deposition of Brittany Sturtevant --

THE COURT: A/k/a Allie Haze you actually heard about so much.

MS. YANEFSKI: Right, in Nevada, and our law clerk just spoke yesterday with the clerk of the court in the

District of Nevada who said that they only had ancillary jurisdiction but that they would not be able to begin an ancillary action or that we wouldn't be able to begin an ancillary action merely to compel the attendance of a witness at a deposition. So The court's advice from that federal court in Nevada was that we should make the motion to compel here in the Southern District, and then this court could request that that motion be transferred to the District Court in Nevada.

So if your Honor is amenable, if that comports with the procedures of the Southern District, we anticipate making this motion because the trail of communications has gone cold as it were with Ms. Sturtevant, who has not responded to any of our phone calls, the latest being February 8th.

THE COURT: First of all, I take it there's no -- defendants have no position on this particular -- you don't have a dog in this hunt.

MR. BURKE: I don't know how relevant -- well, they -- they can choose who they want to depose, your Honor. It seems they're going through great pains to try to depose somebody in Vegas but --

THE COURT: Well, this is somebody who may not be available at trial, and you know whose name has come up --

MR. BURKE: But then they're not going to be able to get the non-party testimony in anyhow. That's a different issue at a different time.

THE COURT: That's a different issue at a different time.

What I really was trying to suss out is any motion that they make to compel Ms. Sturtevant to appear for a deposition is going to be unopposed by defense counsel; is that a fair statement?

MR. BURKE: Yes, so long as -- and they've been gracious enough, talking about scheduling.

THE COURT: Right.

MR. BURKE: So that, if it ultimately comes to that, that we'll work out when those dates are.

THE COURT: Okay. So make the motion and include a proposed order and as much guidance as you can give me about what you think I ought to do with it once I enter it, because this is taking us into *terra incognita* here.

MS. YANEFSKI: Thank you, your Honor.

THE COURT: Okay?

MS. YANEFSKI: So with regard to our outstanding discovery demands, I just have a few points. On -- for defendant Ludwigsen, there are two issues, one of which Mr. Krouner conferred with Mr. Burke just prior to commencing today, which was we had requested an authorization for Mr. Ludwigsen's military file. Mr. Burke assures us that that will be in our possession imminently, so I hope that he is correct about that.

The second issue, which it seems as if plaintiffs' counsel and defendants' counsel have different recollections, is regarding Mr. Ludwigsen's criminal file where we requested in our discovery demand, second discovery demands, the entirety of Mr. Ludwigsen's, read the language, all documents submitted by or on behalf of defendant Ludwigsen in connection with his sentencing in *People v Ludwigsen*, including without limitation to evaluation reports created by Charles Flinton MD from San Francisco Forensic Institute, the interface of psychology and law, dated March 1, 2016 and March 13, 2016 respectively.

Mr. Burke has provided us, as of December 21st, with a copy of the forensic psychiatric report for Mr. Ludwigsen. He's not provided us with anything else, and we believe that we are still entitled to any criminal records that would be in possession of Mr. Burke or Mr. Ludwigsen or Mr. Ludwigsen's criminal attorney. That was all contemplated in our request.

THE COURT: Like what?

MS. YANEFSKI: Anything submitted on his behalf to the criminal court, so any motion papers, anything advocating on his behalf. It's comprehensive, and it certainly was not limited to the forensic psychiatric report, which Mr. Burke seems to believe that it was.

MR. BURKE: I just followed their demand, your Honor; anything that was submitted during the sentencing. Everything else is publicly available. The issue that was addressed, and

we had a conference a long time ago over this, was, as far as what was submitted to probation, and this was the issue as to the forensic report, because everything else was publicly available, and then it was narrowed down to, I must produce the forensic reports that were submitted to probation on behalf of Mr. Ludwigsen, and I've complied with that.

So now to, at the eleventh hour, broaden their demand as to what they're claiming they believe they're entitled to was not what was addressed previously at a prior conference and I've complied with everything that was obligated of my client to turn over by way of the forensic reports that were submitted to probation at the time of sentencing.

THE COURT: My notes, my notes of our conference on August 18, 2017, which was, by my count, in person conference number three, in relation to discovery only read as follows: If they were submitted to criminal court in connection with sentencing, they are relevant. If counsel has them, they must be turned over.

You have some basis for thinking there's something else that falls within that that they haven't given you?

MS. YANEFSKI: Well the turn there is that Mr. Burke hasn't said that this is -- he hasn't represented to us via his letter enclosing the psychiatric report or in any other form that this is the entirety of the criminal file submitted on Mr. Ludwigsen's behalf for sentencing. He's just told us that

he thinks all we asked for is the forensic psychiatric report, and I think the distinction is important.

MR. BURKE: Your Honor, we dealt with this in August just based -- and my notes are similar to the Court's as to what was at issue, and what was issue were these forensic --

THE COURT: It seems like we were talking about some kind of psychological or psychiatric records, which sounds to me like it's this forensic report that you're talking about.

MR. BURKE: Right, which they got in September.

THE COURT: So I'm not understanding what it is that you think he's not giving to you.

MS. YANEFSKI: Any other document submitted in connection with sentencing. He hasn't -- he's not saying that this is all that there was.

THE COURT: Is there some sort of -- you know, I used to do this for a living.

MR. BURKE: Judge, I mean, Judge --

THE COURT: Typically there's some kind of unitary submission that goes to the judge.

MR. BURKE: You know, to be honest, if there was a sentencing submission that was made on behalf of his defense counsel there, again, it would be something that is publicly available, so what was being addressed in August was what wasn't publicly available that was in the possession of the Department of Probation and the issue of whether that would be

discoverable or not. So, never before had there been any issue of well what else was submitted to the court that is otherwise publicly available.

So if they're saying I've got to go to the docket and say here's what's been publicly provided to the court, I can do that as well as they can.

THE COURT: This was a --

MR. BURKE: It's an electronic --

THE COURT: This is a public docket; yes?

MR. BURKE: Yes.

THE COURT: It's not sealed or anything because --

MR. BURKE: No.

MS. YANEFSKI: Right. There may be something sealed because of the sex nature of the crimes.

THE COURT: Well wouldn't the docket reflect that they were sealed submissions? Plus, if the psychiatric report wasn't sealed, I don't know what would be.

MR. BURKE: That was the only thing that was at issue as far as sealing -- not publicly available, because it was submitted to probation. Probation had it within their files but it was not maintained in the public's file because of the sensitive nature that it was a psychiatric report. That was what was teed up in August. That's what we addressed. There was never any follow-up --

THE COURT: Look, Mr. Burke --

MR. BURKE: I'll get them --

THE COURT: -- if there was anything that was submitted to the court in connection with Mr. Ludwigsen's sentencing I think is relevant because somebody thought it was important at the time, if it's on the docket, plaintiffs can find it, but if you are in possession of undocketed submissions other than the psychiatric report, it should go to plaintiffs' counsel. That's the end of that.

MS. YANEFSKI: Thank you, your Honor.

THE COURT: All right? If there is nothing --

MR. BURKE: Just one.

THE COURT: You've got something there?

MR. BURKE: I didn't want to pass an opportunity --

MS. YANEFSKI: I wasn't done yet either.

MR. BURKE: Oh, I'm sorry.

THE COURT: That's all right.

MR. BURKE: Your Honor, just so there's clarification now after the August 1, which we thought we had some clarity, I'll see what's been publicly submitted, and if there was something that was submitted that's not publicly filed, I'll endeavor to find out what that could possibly be, but from everything that I understood the only issue is that, I'll now go back because that wasn't --

THE COURT: Often there might be a letter saying, your Honor, in connection with sentencing, we're sending you,

you know, this letter from his mother and this letter from this other person, you know, I don't know what there is.

MR. BURKE: Okay.

THE COURT: Sometimes --

MR. BURKE: Yes.

THE COURT: -- in the state courts there's more informality and people do things verbally.

MS. YANEFSKI: So, your Honor, I had one more issue, which is that we understand the defendants are serving requests for documents on non-parties whether via subpoena as in non-party witness, Ms. Perez, or via authorizations on plaintiffs' treating physicians, and it's come to our attention that defendants are being sent some of these records. We know for instance K. Doe's psychiatrist has sent records to the defendants and defendants haven't produced any of those materials to us which they are required to do under supplementation.

THE COURT: This is --

MS. BOCHNER: We have no problem providing --

THE COURT: Yes, I mean, that's --

MS. BOCHNER: We've recently received something, but it works the same way, we're still chasing down doctors for incomplete records that they're providing with us. So I know that plaintiffs recently completely re-served supplemental Rule 26.

THE COURT: Look we're all on the same page about this.

MS. BOCHNER: So the same, if you can serve us with any new medical records --

MS. YANEFSKI: Right. Of course.

MS. BOCHNER: -- that are in your possession, we'll serve you with whatever we've gotten.

THE COURT: These kinds of things that are obtained by subpoena are supposed to be shared, and I will rely on counsel to do that.

MS. YANEFSKI: That's it, your Honor.

THE COURT: Okay.

Mr. Burke, back over to you.

MR. BURKE: Just a -- there's an ongoing dispute as to the scope of the social media that -- we addressed it, we got Mr. Krouner's position of we're working on -- and we got those responses on the date that the court had set; however, it's still limiting the social media to just communications between players and related to softball and that's not what the demands related to, the demand's far broader than that for all social media during the timeframe of the 2014/2015 season and beyond because of the claims of the damages that they're saying that they've removed themselves from their friends, their family, and aren't the same as a result of what had gone on back in '14 and '15. Those materials have not been produced.

They're taking a position that they've narrowed their answer to, yes, you've asked for everything, but we're only giving you this.

So we're still back to -- it's similar to what had gone on with the emails but nonetheless, we have this issue here on the social media front where we've asked for everything and there's actually now been a change in the -- not change but a reaffirmation of the defendants' position on the Court of Appeals decision that just came down last week from the State of New York as far as the discoverability of social media when there is at issue the plaintiffs' condition or claimed condition and a change of that condition as a result of the alleged conduct.

So we're still in this frame of we make a broad demand, we get told they're working on it, they give us the response and they narrow their response beyond what the demand is.

So I can do one of two things, I can tee that up with your Honor for the 28th as well in a letter --

THE COURT: I think that's what you should do.

MR. BURKE: I think that that's --

THE COURT: I think that when you were here in January you told me that plaintiffs had not responded, plaintiffs have agreed to supplement. Plaintiffs agreed to provide all social media from 2014 to the present without

limitation and notwithstanding plaintiffs' objections to relevance.

MR. BURKE: And that wasn't done.

MS. BOCHNER: Your Honor, on January 19th we did receive the responses, as the Court ordered. The issue, I think, is Facebook messages. So the demands may have been vague as far as Facebook communications. There are Facebook posts. There are Facebook private messages. There are Facebook chats. And it seems that plaintiffs are taking the stance that we are not entitled to the Facebook messages from 2014 to the present.

Mr. Burke and our office both sent letters in response to the January 19th submission and again argued that we're entitled to the entirety of plaintiffs' Facebook accounts, including messages.

MS. YANEFSKI: Your Honor, if I may take the Court through a timeline of how terms have been used in this case.

The simple fact is, the defendants have not -- or at least defendant Ludwigsen never requested Facebook messages from the plaintiffs beyond the scope of their messages to or relating to defendant Ludwigsen. And the terms social media has been used in connection with social media posts which have been a different creature throughout this action until one turn of phrase by Mr. Burke in a letter dated December 21 just a couple of weeks before Mr. Krouner made his representation he

would serve all social media at this conference.

So, in the 18 months of this case, August of 2016, defendant Ludwigsen's first request to produce to plaintiffs his request number five is any and all communications you have sent or received that relate in any way to defendant including all text messages and Facebook messages to, from or about defendant.

In that December of 2016 second request to produce there's a different request; any and all of plaintiffs' social media posts from January 1st, 2014 to the present.

February 17, 2017 Mr. Burke sent our office a deficiency letter and it lists in completely unrelated subheadings separately asking for production of social media from 1/1/2014 through the present, that's the first unnumbered subheading, and then down at the third unnumbered subheading is for all communications including Facebook messages. Same thing, and deficiency letter June 2017 --

THE COURT: All communications.

MS. YANEFSKI: All communications, including Facebook messages relating to Ludwigsen.

THE COURT: Okay.

MS. YANEFSKI: Sorry. And June 28, 2017 another deficiency letter, it's same in substance as the February letter, subheading four, social media posts. Subheading seven is communications, including Facebook messages relating to

Ludwigsen.

And then July 12th of last year Mr. Burke wrote your Honor, and this letter to the Court again has under subheading five, social media posts, that's the term, from January 2014 to the present, and then under another subheading is communications, including Facebook messages relating to Kurt Ludwigsen.

November 16, 2017, we get another deficiency letter from Mr. Burke, who says I want to follow up on outstanding discovery items in accordance with your Honor's order during the August 18th conference. We are still waiting on plaintiffs' social media posts from June 2014 to the present as well as all communications with or about Mr. Ludwigsen.

And then for the first time on December 21st, Mr. Burke writes a deficiency letter to our office where suddenly he's talking about Facebook messages in connection with social media and not in connection with communications, so he says, second, as you know, we have demanded, one, all of plaintiffs' social media posts and messages from June 2014 to the present and, two, all communications with or about Kurt Ludwigsen. And he says it's been over a year since we first made this request. So that's not true, because it had not been over a year since he made that request. He was changing his request in his letter.

THE COURT: In other words, the new -- what's new in

that December request is a request for Facebook messaging --

MS. YANEFSKI: Correct.

THE COURT: -- not related to Mr. Ludwigsen.

MS. YANEFSKI: Right. For all Facebook messaging. And using the term social media in conjunction with Facebook messages for the first time as distinct from social media was posts, and Facebook messages were communications, and now he's conflated the two. And so that was when Mr. Krouner said to your Honor in January that plaintiffs would provide all social media. We're going to an 18-month history of the case where social media means social media posts, and we provided that to Mr. Burke.

So, where he says that he had a demand for all of our Facebook messages, that's not true. We provided the relevant Facebook messages that he demanded.

THE COURT: Well, he's demanded them now.

MS. YANEFSKI: But he's demanded them after 18 months of discovery, and we would argue that they're not relevant and where Mr. Burke cites to Court of Appeals law that, you know, certain social media is discoverable where the plaintiff claims certain damages, that is not an unqualified law, it's not an unqualified standard, and you know, there are courts in this circuit that have said that the -- if I may -- plaintiffs' entire social networking account is not necessarily relevant because he or she is seeking emotional distress damages.

That's in the Western District. Eastern District, emotional distress claims does not warrant disclosure of all Facebook posts, *Silva versus Dick's Sporting Goods*.

THE COURT: Just so I understand, and I will tell everyone, I'm not on Facebook, so -- although I've issued warrants to them many times, I have a somewhat primitive understanding here, but Facebook posts, as I understand it, and I just want to make sure we're using the same terminology here, refers to something that is posted to the world or at least to a large community of recipients.

MS. YANEFSKI: That's correct.

THE COURT: Whereas Facebook messaging is more like emailing --

MS. YANEFSKI: That's correct.

THE COURT: -- that's addressed to a particular recipient.

MS. YANEFSKI: Right, and subject to the same relevance law in terms of production and discovery that email would be.

THE COURT: So, Mr. Burke, why isn't a demand now for all Facebook messaging similar to a demand for all emails you sent to anybody for any purpose over this period of time or all letters you wrote or all communications of any kind whatsoever, which is almost always going to be an overbroad request?

MR. BURKE: Well, it would be, your Honor, with

certain caveats. I mean, if you have a plaintiff who's claiming that they are not able -- that they've withdrawn from their friends and their family as far as their daily life activities because of what went on here, then I believe it would be, and I think that there's a strong position that the information before then to show what their social media communications were like, and then during and after what those communications are like, to show if, in fact, there actually had been some kind of damage of withdrawn -- of them actually being withdrawn or did they continue to live their lives as they did before.

So to say that it would be overly broad, we narrowed it to the beginning, I didn't ask for the prior, I asked for during the time of and after, so I could see what their social media and posts were like, I don't have the timeline that she's put together as far as my demands.

THE COURT: You're going to get the posts, if you haven't already gotten them.

MR. BURKE: I haven't gotten the messenger.

THE COURT: Right.

MR. BURKE: Right. I supposedly got the posts, but what we had was, we were here in January where there was no, hey, look, they're asking for everything and we're only going to give them this.

THE COURT: The problem here, Mr. Burke, is that I

think what we talked about in January was social media --

MR. BURKE: Right.

THE COURT: - without drawing the distinctions that are now being drawn.

MR. BURKE: And, you know, in fairness, your Honor, to say now, well, it's Facebook but it's the messaging and not the posts, we're talking about social media which incorporated Facebook. I didn't say I just wanted this, and they didn't say you're only going to get that. They said you're going to get the Facebook social media irrespective of -- irrespective of the relevancy arguments that he otherwise would raise. He said he'd give us that, we didn't get that. He decided to then just say, I'm not giving you the messages, I'm just going to give you the posts.

And then there's issues, there's further issues as to are we getting the posts that were publicly made versus the ones that were privately made and those things --

THE COURT: Well that we can find out.

MS. YANEFSKI: We provided all of the public and private posts. I don't recall -- plaintiffs did not make any sort of objections or withhold anything based on grounds of privacy with regards to the posts as distinct from the messages.

MR. BURKE: The other thing, too, as far as, you know, the demand was made in December, if the demand that

they're saying now is the one for the first time, which I don't believe is the case because I've been -- she points to it, a bullet point up here and a bullet point down there, and says therefore they must be conflated and related. I don't know, I don't have all those letters in front of me to go through, no, Judge, because all I can tell you is that the continued responses we got were deficient, and I continue to go back and say, hey, look, we're looking for all of this, we've been asking for it for a long time now and you continue to give us dribs and drabs, you say you're working on it, you demanded all these things from us and the simple me requesting Facebook access, Facebook messages, Facebook postings under the broader umbrella of Facebook social media that you're not giving us access to that, we're entitled to. And they didn't raise that objection of saying we're only going to give you portions but not others.

So there's obviously something here where there are communications, messaging back and forth, whether it be between plaintiffs, between someone that they don't want us to have access to.

And just to get back to the initial preservation letters and all that, this was something that was covered under that broader umbrella, and now they're the ones that are parsing saying, oh, well, you didn't really ask for the posts, you asked for -- I mean, you asked for the posts, but you

didn't ask for the messages. They're all under the broader social media context of ways of communicating.

THE COURT: Well, but there's a tremendous difference between public posts, which are available, as I understand it, to anybody, or anybody that's on Facebook, and private posts which go to the community of friends, if that's the terminology, but are posted to a community somehow versus private one-to-one communications which it doesn't really matter whether it's on Facebook or email or text or anything else, and so I do think it is a logical distinction for plaintiffs to draw and, frankly, I find it kind of remarkable that you think it's okay to just say, you have to give me all your communications without any restriction on subject matter or who you're communicating with because that really sounds like fishing.

MR. BURKE: Your Honor, it's not in a sense that we've limited the scope. And by the way, when you have --

THE COURT: You've limited the scope to?

MR. BURKE: To the beginning of -- I didn't ask for prior.

THE COURT: You've limited the period of time that you made the request for.

MR. BURKE: Correct. Limiting the scope by way of a temporal limitation; however, when you say that -- when you have testimony from plaintiffs who are saying that their

everyday activities have been affected as a result of this then I believe that -- and they're very active on social media communicating, whether it be texting, that would be discoverable, your Honor, whether it's going to be --

THE COURT: Would you be able to tap their phones?

MR. BURKE: Would I be able to tap their phones? No, but I should be able to get their phone records to show who they actually are communicating with. To say, hey, look, if she's saying that I was withdrawn, I wasn't speaking to my family, and there shows that there's 15 phone calls to her mother, that's something that I'd be able to confront a person about. And that should be something I'd be allowed to discover. So to say that I should be limited and not be able to challenge what their claims of their affect on their daily life activities which, for these young girls, social media was a big part of it and so were communications through Facebook, that those things are all discoverable for the timeframes of what we're talking about.

THE COURT: Have you got any authority for this proposition that you can just look at -- demand to look at all of somebody's communications which might include --

MS. BOCHNER: We do, your Honor. Hold on one second.

MR. BURKE: And we're just looking to --

MS. BOCHNER: It's in a letter that we wrote to plaintiffs' counsel on February 16th that my office did.

THE COURT: Okay, I don't think I got that one.

MS. BOCHNER: You did not.

MR. BURKE: You did not, it's between the parties.

Your Honor, in looking at Ms. Bochner's letter, it says, quoting this portion, says, "Particularly in claiming" -- "in claims involving personal injury, courts have found that social media information may reflect the plaintiffs' emotional or mental state or physical condition, activity, level of employment, this litigation and injuries and damages claimed." And that's citing *Sourdiff* --

THE COURT: Social media information, I mean that's kind of a broad term; isn't it?

MR. BURKE: Well that's the thing that --

THE COURT: I mean, you're getting some social media information, just not the kind that you're now insisting on.

MR. BURKE: Well, here it says, "More pointedly, where a plaintiff puts her emotional well-being at issue," which they all have here, "by asserting claims of sexual harassment," which they all have here, "courts typically find that social media content is relevant because Facebook usage," and it doesn't limit it to posts versus messaging, it says, "Facebook usage depicts a snapshot of the user's relationship, state of mind at the time of the content of the postings."

So that's talking about postings, but also the messaging I think, if it is something that is clearly --

they're claiming one thing of withdrawal, and I'm not communicating with my family, I'm not communicating with my boyfriend, it's affected my relationship with my friends, and those messages belie that, these clearly discoverable in allowing us to defend the claims that they're making.

So this is not a fishing expedition, Judge, based on their claims, their claims of injury and damages, and the case law that I cited, those two cases, one from the Southern District, one from the Northern District within this circuit clearly supports the position that that's discoverable. Whether it's --

THE COURT: Well, that some kind of social media information is discoverable. It's -- part of the problem is that Facebook does everything now. I've got news feeds, we've got all kind of things. To refer to it as social media is like referring to written materials, which might include letters and newspapers and books and menus and all sorts of things. It's a very broad classification.

MS. BOCHNER: Your Honor, just to add to the cases cited by Mr. Burke, the Court of Appeals, which is understandably not federal court, recently came down with a decision actually only last week in the case of *Forman v. Henkin*, in which they did discuss specifically Facebook messages and allowed for the discoverability of Facebook messages when the plaintiff's emotional state and their being

withdrawn was put at issue. I can give you the slip opinion cite, is 2018 New York Slip Op 01015, and that was Justice DiFiore in the Court of Appeals, and it specifically discusses Facebook messages.

THE COURT: In the context of --

MS. BOCHNER: Of discoverability by defendants' counsel that Facebook messages --

THE COURT: Facebook messages with anyone at all not restricted by subject matter or --

MS. BOCHNER: Specific for a time period to discuss the amount of communications. There was an agreement in the lower court that plaintiffs would turn over the amount of characters was one thing that the courts, the lower courts, contemplated, that characters in a message versus what was actually said in the private message to be able to assess whether somebody is having long conversations with friends following --

THE COURT: So they didn't order that the content be divulged.

MS. BOCHNER: In the end, once it went -- I apologize, your Honor.

THE COURT: You know, don't try to read it on your screen, I'll read the case.

MS. YANEFSKI: If I may, your Honor, looking over the *Forman* case, which I was lucky enough to bring today and having

not read it in depth, I would just like to point out to your Honor to be aware of when reading it that it seems like the case is turning on a distinction between public facing posts and private facing posts and doesn't touch specifically on the issue of messaging as distinct from posting.

THE COURT: All right, I'll read the case. I'll give you a ruling on that as well.

Anything else we need to do this afternoon?

MS. YANEFSKI: I just wanted to update your Honor with regards to settlement, that the parties have conferred and there is no settlement at this time.

THE COURT: There is no settlement --

MS. YANEFSKI: Correct.

THE COURT: -- at this time.

MS. YANEFSKI: Wouldn't that be something.

MS. BOCHNER: Your Honor, just to quickly address that. I know several conferences ago, I don't have the exact date, I know the issue of plaintiffs' retainers was discussed, and it was contemplated -- my office and Mr. Burke's office had requested copies of plaintiffs' retainer agreements, and it was decided that at this time plaintiffs would produce redacted copies of the retainer agreement just showing the date; however, your Honor left it open that, when the case comes closer to trial, that the entire retainer agreement would likely be discoverable in light of certain claims and their

involvement of attorneys fees as part of a damages claim. In these --

THE COURT: Well, I mean, this would be, in other words, attorneys fees wouldn't be assessed by the jury in this case, right, they would be the subject of a separate fee application --

MS. BOCHNER: Correct. However --

THE COURT: -- that would be addressed to the Court after plaintiffs -- in the event that plaintiffs obtained a favorable verdict.

MS. BOCHNER: Yes. However, while settlement discussions are taking place, part of plaintiffs' settlement demand is not just monetary value for the plaintiffs, but he's also looking to us for attorneys fees upward of six figures, possibly higher. We haven't been provided with any breakdown of the attorneys fees, although we've asked. Therefore, again, I would renew that our demand for complete, unredacted retainer agreements is now a ripe issue that plaintiffs should turn over. In the event that settlement discussions are able to proceed, that this is something that's clearly at issue and we're clearly entitled to if plaintiffs are seeking this high number of attorneys fees.

MR. KROUNER: Your Honor, respectfully, I think this issue is moot and not ripe, as your Honor previously ruled when the subject of retainer agreements was first put to the

Court --

THE COURT: At that time there was an issue about when plaintiffs' counsel had been retained; isn't that right?

MR. BURKE: Yes.

MS. BOCHNER: That was the issue, but the issue was also for the retainer agreement.

MR. KROUNER: In terms of the premise that Ms. Bochner is making at this time as it relates to settlement, without getting into the substance of the settlement discussion with the Magistrate Judge or on an open record, the substance of the conversation I had with Ms. Bochner in this courtroom before your Honor took the bench was to the exact opposite, that based on the demand, independent of requests for attorneys fees, the defendants and their interested parties were not interested in continuing any dialogue.

So I will accommodate Ms. Bochner if and when in good faith she tells me that we have something to talk about, but I understood before this conference began this afternoon, this afternoon, that this issue is not ripe because they had no desire to engage in any settlement dialogue. So the issue of tagging a settlement negotiation to our retainer agreements and lodestars is just the opposite of what she told me earlier.

THE COURT: Well, you know, in any event, the Court obviously wants to encourage settlement discussions and assist in any way, but whether plaintiff counsel wants to informally

share materials or summaries or some kind of information about what their fee demand is likely to look at, they're free to do that, but I'm not sure that I would be inclined to make them do it.

And, frankly, I'm not sure what the retainer would -- what light the retainer agreement would shed on that discussion because if the -- if this goes to a fee application, it's going to be based on their billable hours and their effort to justify the number of hours expended and the hourly fee that is associated with that and you know that's a whole process. So I'm not sure that I want to inject myself into this further. All right.

Do we have another conference scheduled in this case?

MR. KROUNER: Not at this time, your Honor.

THE COURT: Then we should put on a phone conference in 30 days.

THE CLERK: Just want to be sure there's nothing else on.

THE COURT: That will be number 21.

THE CLERK: We could do March 21st at 10:00 o'clock.

MR. KROUNER: By telephone?

THE COURT: Yes. As always, unless we're overtaken by events. All right.

MR. KROUNER: Thank you.

THE COURT: Have a good afternoon, everybody. I'll

look forward to your additional submissions.

MS. YANEFSKI: Thank you, your Honor.

THE CLERK: All rise.

(Proceedings concluded)

Certified to be a true and accurate transcript of the digital electronic recording to the best of my ability.

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U.S. District Court

Official Court Reporter

EXHIBIT F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
K. DOE, et al.,

Plaintiffs,

-against-

KURT LUDWIGSEN, et al.,

Defendants.
----------X

ORDER

15 Civ. 7822 (CS)(PED)
15 Civ. 7827 (CS)(PED)

On or about October 26, 2017, plaintiffs' counsel caused to be issued a subpoena ad testificandum and duces tecum, addressed to Brittany Sturtevant ("Ms. Sturtevant"), a.k.a. Allie Haze (the "Subpoena"). The Subpoena called for her deposition on December 18, 2017, in Las Vegas, Nevada, where she resides. Ms. Sturtevant was served with the Subpoena on or about November 2, 2017.

Presently before this Court is plaintiffs' motion to compel Ms. Sturtevant's compliance with the Subpoena (15 Civ. 7827, Dkt. #112).[1] Specifically, plaintiffs seek an Order compelling Ms. Sturtevant's videotaped deposition on April 30, 2018, at the Reisman Sorokas law office, in Las Vegas, Nevada, and, compelling production of all responsive documents to the subpoena by 5 P.M. on April 16, 2018.

This Court adheres to its previously-expressed view that, pursuant to Rule 45 of the Federal Rules of Civil Procedure, the motion **must** be filed in the district where compliance is required (the United States District Court, District of Nevada–Las Vegas).

Accordingly, because this Court lacks jurisdiction under FRCP 45 to enforce the Subpoena (absent transfer of the motion to this Court from the District Court of Nevada pursuant to Rule 45(f)), plaintiffs' motion is **DENIED WITHOUT PREJUDICE**.

Dated: March 8, 2018
White Plains, New York

SO ORDERED.

PAUL E. DAVISON, U.S.M.J.

[1] The motion was not filed under the designated lead case, 15 Civ. 7822 (CS)(PED).